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In The
Supreme Court of the United States

October Term, 1999

COUNTY OF ARMSTRONG, JACK DUNMIRE, ROBERT A. CINPINSKI AND JAMES SCAHILL, INDIVIDUALLY AND AS COMMISSIONERS ON THE BOARD OF COMMISSIONERS OF THE COUNTY OF ARMSTRONG,

Petitioners

vs.

JANICE M. CLARK,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioners, County of Armstrong, Jack Dunmire, Robert A. Cinpinski and James Scahill, individually and as Commissioners on the Board of Commissioners of the County of Armstrong (hereinafter "County of Armstrong"), have petitioned the Court seeking a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit. In a memorandum opinion, the Court of Appeals held that the petitioners waived the issues raised by their Rule 50 motion for judgment as a matter of law in which the petitioners argued that the respondent's Title VII and PHRA claims were barred because she did not properly file EEOC and PHRC complaints; that petitioner's Section 1983 claim should have been dismissed because she presented insufficient evidence of discriminatory intent; that the evidence was insufficient to support the imposition of punitive damages by the jury under Section 1983; and that the individual defendants had absolute legislative immunity from Section 1983 liability. The United States Court of Appeals for the Third Circuit held that the petitioners did not preserve these issues for appeal. The United States Court of Appeals for the Third Circuit also held that the petitioner's motion in limine and petitioner's objections at trial pursuant to Rule 403 were properly denied. Furthermore, the United States Court of Appeals for the Third Circuit also held that the introduction of plaintiff's medical expert and the medical expert's testimony regarding the

respondent's emotional distress were properly presented.

The petitioners are attempting to obtain a writ of certiorari on asserted discretionary rulings by the District Court and on claims of misapplication of a properly stated rule of law. The petitioners are not claiming that the United States Court of Appeals for the Third Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The petitioners also are not claiming that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals and the petitioners are not claiming that a state court or the United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Finally, the Third Circuit has designated their opinion in this matter as "unreported - not precedential." This case has absolutely no precedential value. *See* Chapter 5, IOP. 5.3, 5.4

(formerly 5.1.2), Internal Operating Procedures of the United States Court of Appeals for the Third Circuit.

In summary, a fair reading of the petitioners' Petition for Writ of Certiorari fails to meet the standard for the exercise of judicial discretion by this Court.

COUNTER-STATEMENT OF THE CASE

The United States Court of Appeals for the Third Circuit has accurately and succinctly set forth the counter-statement of the case. As a result, the facts set forth on page 3(a), 4(a), 5(a), and 6(a) are set forth herein.

In 1992, plaintiff Janice Clark was director of the Tax Claim, Tax Mapping and Assessment Offices in Armstrong County. She reported directly to the three person Armstrong County Board of Commissioners and supervised a staff of fifteen people. In January 1992, Jack Dunmire and James Scahill were elected to the Board of Commissioners, joining Robert Cinpinski, a member since 1988. After the election, the Commissioners stopped returning Clark's calls, kept her waiting for meetings or canceled them, and did not answer her memos. Instead, they met with William Brueggeman, the Chief Assessor in the tax claim office, who was supervised by Clark,

giving him information about the tax claim office. They also awarded Brueggeman a merit raise without Clark's input and denied her a raise without stating a reason. In response to a request by Clark, the Board authorized her to hire a full-time clerk. She interviewed candidates and placed her selection on the Board's agenda, but the Board did not approve it or return her phone calls about the matter.

In August 1993, Clark learned that a taxpayer's property was scheduled for sale, although the taxpayer had paid his taxes. On August 11, 1993, Clark informed Cinpinski of the incident and recommended an audit of the tax claim office. At Cinpinski's request, Armstrong County Detective Homer Crytzer investigated, with Clark's cooperation. On August 17, 1993, Clark balanced the tax claim office's lien certificate fund, containing money received when the office sold lien certificates and tax lists to taxpayers. Clark found that the fund was not balanced and that proper procedures had not been followed. Clark wrote receipts for payments that had been received without receipts being issued, filed the carbon copies, and discarded the original copies, which would ordinarily have gone to the purchaser as a receipt. She also threw out duplicative Xerox copies of some receipts. The next day, Jeanne Anthony, a clerk in the office, told Crytzer that Clark had tampered with receipts in the lien certificate file. The same Jeanne Anthony was later convicted of stealing tax payments. Jeanne Anthony's thefts had caused the improperly scheduled tax sale referred to

above.

On August 19, 1993, Cinpinski, Dunmire, Crytzer and Armstrong County District Attorney and others, in the presence of Clark's staff and the public, balanced the cash in her office, inventoried and removed the office safe, and removed filing cabinets containing office records. That afternoon, Clark was called to a meeting with Commissioners Dunmire and Cinpinski. Anthony's charges were described, but Clark was not told who had made them. Clark denied the charges and said that her accuser would be found to be the thief. Dunmire replied, "I don't think so." The Commissioners told Clark she was suspended without pay until the investigation was complete. She was escorted to her office to retrieve her purse and then escorted from the building. Clark's suspension was reported to the Press, but her name was not used. Following her suspension Clark's family physician diagnosed Clark as depressed. He testified that in his opinion, her depression was caused by "the duress that she had alluded to as far as having been accused of stealing money and the ordeal that she had subsequently been subjected to."

Brueggeman was acting director of the offices, replacing Clark, and Anthony was placed in charge of the tax claim office and given a raise. A full-time clerk was hired, as originally requested by Clark, and a new position beneath the directors was created. Anthony continued to steal money during

Brueggeman's tenure, and there was also at least one more incident in which a taxpayer's property was listed for auction after she had paid her taxes.

The investigation of the missing tax funds was turned over to the State Police, who arrested Anthony in late September, 1994 for stealing tax payments. The theft with which she was charged occurred while Clark was in charge of the office. Anthony's arrest was widely reported in the County. On October 3, 1994, Clark requested a decision regarding her employment status. On October 6, 1994, she attended a Board meeting and repeated her request. The Board replied that it would hold a hearing to determine her employment status. On October 17, 1994, Clark filed charges with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC), alleging sex discrimination for failure to reinstate. On October 19, 1994, the Board told Clark by letter that the hearing on her employment status would be held on October 25, 1994. Clark's attorney objected to the short notice and stated that Clark would not attend any hearing because the Board was biased.

The Board fired Clark at a public meeting on November 3, 1994. It did not publicly announce the reason for the termination, but sent Clark a letter saying she had been fired for "your failure to adequately supervise employees in your office, failure to adequately manage your office, improper maintenance

of the tax lien certificate fund, your alleged destruction, alteration and falsification of records of the tax lien certificate fund, inaccurate and erroneous record keeping in your office and your failure to identify and correct these deficiencies." On December 16, 1994, Clark filed charges with the EEOC and PHRC, alleging that she had been fired in retaliation for earlier charges.

In August 1995, Anthony was charged with further thefts from the tax office. These thefts had occurred while Brueggeman was director. The charges were once again widely reported. Anthony was convicted of both sets of thefts in May 1996. Brueggeman remained in charge of the offices until June 1996, when he retired. In October 1996, Brueggeman's replacement resigned and Brueggeman was rehired as a consultant, working until the end of the calendar year. He was not disciplined for Anthony's thefts.

On August 17, 1995, Clark sued the County, the Board of Commissioners and the three commissioners. She brought claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., Subsections 2000(e) to 2000(e)-17 (West 1994) (charging that her termination was discriminatory on the basis of sex and retaliatory); 42 U.S.C.A. §1983 (West 1984) (charging violations of her right to equal protection and deprivation of liberty without due process); and the Pennsylvania Human Relations Act, 43 Pa. C.S.A. Subsections

951-63 (West 1991 and supp. 1998) (charging sex discrimination and retaliation). The due process claim was dismissed at summary judgment. A jury trial was held on the remaining claims.

At trial, Clark presented evidence regarding G. Paul Simon, the former director of the County's Emergency Management Agency. A female County employee accused Simon of sexual harassment and then complained that Simon was contacting her and driving past her office and her house. Simon was told by the Board to stay away from the woman, but Scahill saw him driving past her office and others reported that he had been contacting her. A written reprimand was prepared but not given to Simon because he suffered a stroke in June 1992. As a result of his stroke, Simon was out of the office for several weeks, during which time Scahill was acting director of the County EMA. While acting as director, Scahill discovered inadequacies in the management of the EMA. During an argument over Simon's compensation, Simon told Dunmire that Dunmire didn't deserve to be on the face of the earth, which Dunmire understood as a threat. In February 1994, Parker City government officials complained to Scahill about EMA's handling of an ice jam. Scahill ordered Simon not to attend a meeting of the Parker City Council, in which local officials were to discuss the ice jam. Simon attended anyway, an act Scahill characterized to the other commissioners as "gross insubordination." Simon resigned after being told that if he did

not do so, he would be fired. The Board did not publicize Simon's resignation.

The jury found that the County and each of three commissioners had "discriminated against . . . Clark based on her sex or in retaliation for making a complaint of sex discrimination." It awarded $425,000.00 compensatory damages and $25,000.00 punitive damages against each individual defendant. The defendants appealed to the United States Court of Appeals for the Third Circuit, which affirmed the jury's verdict and the rulings of the District Court. The defendants, who are now the petitioners, are seeking a Writ of Certiorari from this Court.

ARGUMENT

A. PETITIONER'S QUESTION I PRESENTED FOR REVIEW WAS WAIVED BY PETITIONER'S FAILURE TO PRESERVE THIS ISSUE FOR APPEAL.

The petitioners argue that the petitioner's Rule 50 motion to dismiss the individual defendants as to personal liability and liability for punitive damages should have been

granted by the District Court. However, the petitioners failed to preserve this issue for appeal. On page 10(a) of the Court of Appeals' opinion, the Court of Appeals states: "But defendants have not preserved these issues for appeal." The denial of a motion for judgment as a matter of law can be appealed only if the motion is made at the close of all evidence and then renewed after an unfavorable verdict. See Greenleaf v. Garlock, Inc., 174 F.3d 352, 364 (3rd Cir. 1999); Yohannon v. Keene Corporation, 924 F.2d 1255, 1262-63 (3rd Cir. 1991); Lowenstein v. Pepsi Cola Bottling Company, 536 F.2d 9, 10-12 (3rd Cir. 1976). The failure of petitioners to move at the close of all evidence is most serious. To ask the court to enter a judgment, contrary to a general verdict of the jury, where no motion for a directed verdict has been interposed, is simply to ask the Court to reexamine the facts already tried by the jury, and this the Court may not do without violating the Seventh Amendment. Mutual Ben. Health & Accident Assn. vs. Thomas, 123 F.2d 353, 355 (8th Cir. 1941)

Additionally, the Rule 50 motion at the close of evidence still allows for a possible cure in proof and the ability to avoid a new trial. This helps avoid tactical victories at the expense of substantive issues. *See* 5A Moore's Rules Federal Practice 850.08 at 2358-59 (1975) as discussed in *Lowenstein, supra,* at 11, as well as numerous other cites therein.

While finding a waiver of claims, the United States Court of Appeals nevertheless analyzed the District Court's denial of the Rule 50 motion and found that they would affirm the District Court's denial of the motion if the petitioners' motion had been properly before the United States Court of Appeals. As a result, this issue has been adequately addressed and decided by the United States Court of Appeals for the Third Circuit.

B. PETITIONERS WERE NOT UNFAIRLY PREJUDICED WHEN THE DISTRICT COURT DENIED PETITIONERS' MOTION IN LIMINE AND OVERRULED PETITIONERS' OBJECTIONS AT TRIAL PURSUANT TO RULE 403.

The United States Court of Appeals wrote an exhaustive analysis of the District Court's ruling on the petitioners' Federal Rule of Evidence 403 motion and the District Court's introduction of evidence regarding the petitioners' treatment of G. Paul Simon. The United States Court of Appeals' analysis is set forth on pages 7(a), 8(a), 9(a) and 10(a) of the Court of Appeals' opinion. Clearly, Rule 403 motions are reviewed to determine whether or not the District Court abused its discretion. United States v. Long, 574 F.2d 761, 767 (3rd Cir. 1978). The petitioners argued at the District Court level that the District Court failed to articulate on the record a balance

between the probative value of the Simon evidence and its prejudicial effect. The Court of Appeals pointed out that if a trial court fails to balance a probative value against prejudice on the record in response to a Rule 403 objection, then the Court of Appeals must decide whether the trial court implicitly performed the required balance or undertake to perform the balance itself. United States v. Eufrasio, 935, F.2d 553, 572 (3rd Cir. 1991). The failure to articulate a Rule 403 balancing is not reversible error per se, but results in a de novo review.

After an analysis of the record, the Court of Appeals found that the District Court did balance the probative value of the Simon evidence against its prejudicial effect. The District Court explained that the evidence was probative because both Simon and Clark had been accused of wrongdoing and had denied accusations, allowing the jury to compare the treatment of a male with a female employee in such a situation. The Court of Appeals concluded that the properly explained reasoning by the District Court on the record clearly showed that there was **no abuse of discretion**. *[emphasis added]*

The United States Court of Appeals further concluded that evidence of how petitioners treated Simon had probative value and may have helped the jury assess the petitioners' motives in this case. See Glass v. Philadelphia Electric Company, 34 F.3d 188 (3rd Cir. 1994). In summary, the petitioners were not unfairly prejudiced by the District Court's

overruling of the petitioners' motion in limine and the petitioners' Rule 403 motion.

C. THE DISTRICT COURT DID NOT COMMIT ERROR BY PERMITTING THE INTRODUCTION OF MEDICAL EXPERT EVIDENCE ON THE ISSUE OF EMOTIONAL DISTRESS.

At trial, the respondent introduced the testimony of the respondent's family physician, Dr. Philip Galacek, which the District Court admitted. Dr. Galacek diagnosed the respondent as depressed following her suspension. Dr. Galacek testified that Clark told him she had been accused of theft. He further opined that her depression was caused by "the duress that she had eluded to as far as having been accused of stealing money and the ordeal that she had subsequently been subjected to."

The United States Court of Appeals held that the testimony of Dr. Philip Galacek was probative of the emotional effects of the petitioners' actions. Furthermore, as the United States Court of Appeals pointed out, the petitioners never explained how the prejudicial effects of Dr. Philip Galacek's testimony substantially outweighed the probative value of Dr. Galacek's testimony. In summary, the United States Court of Appeals has carefully, adequately and correctly analyzed the issue regarding the introduction of the respondent's medical

expert and the medical expert's testimony.

D. THE ISSUE OF THE TIMELINESS OF FILING A CHARGE OF DISCRIMINATION WITH THE EEOC UNDER TITLE VII AND WITH THE PENNSYLVANIA HUMAN RELATIONS COMMISSION WAS WAIVED BY THE PETITIONERS.

Once again, the issue set forth in this argument by the petitioners was waived by the petitioners. As the United States Court of Appeals sets forth on page 10(a) of their opinion, the petitioners at trial were denied their Rule 50 motion for judgment as a matter of law in which they argued that Clark's Title VII and PHRA claim were barred because she did not properly file EEOC and PHRC complaints; that Clark's Section 1983 claim should have been dismissed because she presented insufficient evidence of discriminatory intent; that the evidence was insufficient to support the imposition of punitive damages by the jury under Section 1983; and that the individual defendants had absolute legislative immunity under Section 1983 liability. The United States Court of Appeals held that the petitioners did not preserve these issues for appeal. However, the United States Court of Appeals went on to analyze these issues as if the petitioners had preserved the issues for appeal. The analysis by the United States Court of Appeals appears in

its opinion on page 11(a) and 12(a). In summary, the United States Court of Appeals held that 42 U.S.C.A. Section 2000(e)-5(f) (1) is a statute of limitations, not a jurisdictional pre-requisite to suit. As a result, it may be tolled in appropriate circumstances. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) and Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3rd Cir. 1994) The Court of Appeals explained that tolling is appropriate "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." See Miller v. Beneficial Management Corporation, 977 F.2d 834, 845 (3rd 1992).

In this case, the petitioners told Clark that her suspension, a preliminary employment decision, was effective until the completion of the Board's investigation. The respondent reasonably understood that, if the investigation cleared her of wrongdoing, she would be reinstated. The respondent requested reinstatement on October 3, 1994, shortly after the responsible party was arrested, and filed her EEOC charge within two weeks. As a result, the United States Court of Appeals held that the filing of the respondent's EEOC complaint and, by necessary implication, the filing of the PHRC complaint was timely.

CONCLUSION

For the reasons set forth above, respondent Janice M. Clark respectfully requests that the Court deny the Petition for Writ of Certiorari of the County of Armstrong, Jack Dunmire, Robert A. Cinpinski and James Scahill, individually and as Commissioners on the Board of Commissioners of the County of Armstrong.

Respectfully submitted,

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